HOW HOCK SING v. LEE SAY PENG & ORS

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN MOHD GHAZALI JC
[CIVIL SUIT NO: 22NCVC-38-02-2014]
17 AUGUST 2015

CIVIL PROCEDURE: *Pre-trial case management – Directions and orders – Failure to comply – Change of solicitors – Whether a delaying tactic for non-complying with 'unless order' – Whether outstanding documents to only be filed if mediation failed – Ability to comply with direction to file common bundle of documents – Whether within control of plaintiff – Repeated failures by plaintiff to comply with 'unless orders' – Whether defendants contributed to failure by plaintiff to comply – Whether there were positive efforts by plaintiff towards ensuring compliance with 'unless order' – Plaintiff's action dismissed for failure to comply with 'unless order' – Whether proper exercise of judicial discretion*

CIVIL PROCEDURE: *Action – Reinstatement – Challenge against decision of Deputy Registrar in dismissing plaintiff's action – Failure to comply with 'unless order' during case management – Mode of proceedings – Proper mode of challenging decision of Deputy Registrar – Rules of Court 2012, O. 34 r. 2(3) – Whether party aggrieved may seek to challenge dismissal only by way of appeal – Application to set aside dismissal of action – Whether proper mode of challenging decision – Whether appeal filed out of time and therefore defective – Whether there were positive efforts by plaintiff towards ensuring compliance with 'unless order' – Whether Deputy Registrar's decision a proper exercise of juridical discretion*

CIVIL PROCEDURE: *Proceedings – Mode of proceedings – Proper mode of challenging decision of Deputy Registrar in dismissing action under O. 34 r. 2(3) Rules of Court 2012 – Deputy Registrar dismissing plaintiff's action – Failure to comply with 'unless order' during case management – Whether party aggrieved may seek to challenge dismissal only by way of appeal – Rules of Court 2012, O. 56 – Whether plaintiff's application to set aside dismissal of action proper mode of challenging decision – Erroneous mode of challenging dismissal of action – Whether curable under O. 1A of Rules of Court 2012 – Whether appeal filed out of time and therefore defective*

The instant case revolved six pre-trial case management conferences. At a pre-trial case management conference on 17 June 2014, the Deputy Registrar ('DR') issued an 'unless order' pursuant to O. 34 of the Rules of Court 2012 ('ROC'), directing the plaintiff to ensure the filing of the common bundle of documents, statement of agreed facts and statements of issues to be tried. At a third mediation session on 20 July 2014, parties failed to reach an agreement. The plaintiff was informed by the DR that the outstanding documents from the plaintiff as specified in the 'unless order' of 17 June

2014, requiring the plaintiff to ensure filing of the same by 7 August 2014, should be adhered to. The first, second and third defendants further informed the plaintiff to furnish the former the proposed statement of agreed facts and statement of issues to be tried prior to the Hari Raya Aidilfitri break. On 3 August 2014, the plaintiff changed solicitors acting for him in this matter. At the case management before the DR on 7 August 2014, since the plaintiff had still not filed the said outstanding documents, the DR having found the violation of the 'unless order' by the plaintiff, decided to enforce the order and thus struck out the claim by the plaintiff against all defendants with costs. The DR also directed that the presence of the previous counsel for the plaintiff purportedly in a capacity as '*amicus curiae*' was not permitted since he had ceased to act on behalf of the plaintiff. The plaintiff's application *via* encl.19 to set aside the striking out and reinstate the claim was refused by the DR, resulting in the present appeal. The plaintiff contended that (i) despite the plaintiff having changed solicitors, the DR's decision to disallow the presence of the previous counsel of the plaintiff deprived the plaintiff the ability to fully clarify the situation pertaining to the status of the filing of the outstanding documents; (ii) in any event, the plaintiff had substantially complied with the directions of the court, apart from the filing of the common bundle of documents and that the parties had agreed that the outstanding documents would be filed only if mediation failed; and (iii) it had followed the correct procedure to challenge the decision of the DR in dismissing the setting aside application. The first, second, third and fourth defendants, on the other hand, contended that the decision of the DR enforcing the 'unless order' by striking out or dismissing the action by the plaintiff was fully justified given the non-compliance and that a party aggrieved by the striking out or dismissal of the action by reason of the enforcement of the 'unless order', should properly appeal against the decision under O. 56 of the ROC and not appeal to the DR for reinstatement, who then also became '*functus officio*'. The defendants further submitted that this appeal was out of time.

Held (dismissing appeal with costs):

(1) The plaintiff chose to change solicitors on 3 August 2014 which was so perilously close to the deadline of 7 August 2014 for filing as stipulated by the 'unless order'. Although well within his right to his own choice of counsel, the timing the plaintiff effected the change was not prudent. It would give rise to the suspicion, as it did to the defendants, that the plaintiff was merely using the change as a delaying tactic, in part as an excuse for the anticipated delay in complying with the 'unless order'. The previous counsel for the plaintiff certainly did not have *locus* to appear in the case management proceedings on 7 August 2014 and the decision of the DR accepting the objection by defendants on this issue was thus not flawed. The previous counsel's purported capacity as '*amicus curiae*' was completely misconceived. (para 23)

(2) There was no agreement amongst parties that they would only re-visit the issue of the outstanding documents only if mediation failed. It is common practice and understanding for parties to pursue both mediation and trial preparations concurrently since 'unless order' generally, as well as in the instant case specifically, are not held in abeyance when mediation is being pursued. Whatever understanding there could have been amongst the parties, it would have been superseded by directions issued by the court on the 17 June 2014 case management conference. Since the common bundle of documents had not been filed by the plaintiff by the case management of 17 June 2014 notwithstanding the 'unless order', another 'unless order' was made on 17 June 2014, requiring compliance by the plaintiff by 7 August 2014, being a further case management date. As it turned out, the common bundle of documents were still not filed by 17 June 2014 or even by 7 August 2014. Even if the contention that the mediation process suspended the preparations for trial, which was not true, there was still a good more than two weeks for the plaintiff to make the effort to comply before the deadline of 7 August 2014 which was set aside by the second 'unless order' dated 17 June 2014. (paras 24 & 25)

(3) The ability to comply with the direction to file the common bundle of documents was entirely within the control of the plaintiff. It could not be legitimately said that the failure to comply with was due to extraneous circumstances. The mediation process, the Hari Raya Aidilfitri break and the change of the plaintiff's own solicitors were either within the control or the knowledge of the plaintiff that negated any arguments of supervening events resulting in the non-observance of the 'unless order'. Even as late as the date of the final mediation of 20 July 2014, the plaintiff had some 18 days to comply. This the plaintiff failed to do. The non-compliance was therefore inexcusable and the failure was intentional and contumelious. The plaintiff had also failed to file the said common bundle of documents pursuant to an earlier 'unless order' dated 8 May 2014. Thus, there was a repeated failure by the plaintiff to comply with two separate 'unless orders' in respect of the direction to undertake the same responsibility of filing the common bundle of documents. (para 27)

(4) There was no evidence of the defendants contributing to the delay. The first, second and third defendants' letter to the plaintiff concerning the preparation of the common bundle of documents itself was not dealt with by the plaintiff. There was no agreement amongst parties to extend time but only to seek a further case management date. There was accordingly no basis to hold any of the defendants to be even slightly responsible for the failure by the plaintiff. There was also no evidence

A of positive efforts made by the plaintiff working towards ensuring compliance with the 'unless order'. Accordingly, after taking into account the facts and circumstances of the case and applying the principles established, including on the *raison d'etre* of an 'unless order' under O. 34 r. 2(3) of the ROC, the decision of the DR dismissing the B action of the plaintiff for the latter's failure to comply with the 'unless order' was a correct and proper exercise of her judicial discretion, was not flawed and ought therefore not to be disturbed. (paras 27 & 30)

(5) The use of the word 'set aside' in O. 34 r. 2(4) of the ROC is intended C to be in the context of the general understanding of the consequence of a successful challenge to the decision to dismiss the action which is to have the decision set aside. However, in order to achieve the successful reversal of the said decision, it does not mean that an application to set aside must be filed pursuant to O. 34 r. 2(4). Order 34 r. 2(4) states the D relevant decision may be set aside by the court, on the 'application' of the party. This 'application' must, considering the Federal Court's decision in *Lim Oh* and the absence of any basis to support the contention that O. 34 r. 2(4) of the ROC envisages a clear departure from *Lim Oh* or contemplates an exception to O. 56 of the ROC, therefore means an application to appeal under O. 56 of the ROC to the judge in E chambers or to appeal to a higher court. A party aggrieved by a decision of Registrar dismissing an action for non-observance of an 'unless order' made under O. 34 r. 2(3) of the ROC may seek to challenge the said dismissal only by way of pursuing an appeal to a judge in chambers in accordance with O. 56. The plaintiff's application before the DR was F correctly dismissed by reasons of the setting aside being the wrong mode of challenging the decision, as the DR did not have the jurisdiction to hear the appeal as well as being '*functus officio*'. (paras 43, 46 & 47)

(6) The plaintiff had also fallen into another error since the appeal to the judge in chambers was filed out of time. Order 56 r. 1(3) of the ROC G stipulates that the notice must be filed within 14 days after the decision is made. Rightfully, it should be the decision of the DR made on 7 August 2014 that ought to have been appealed against. The appeal notice was filed only on 25 February 2015 and even then, that was in respect of the appeal against the subsequent decision of the DR who, on H 17 February 2015, dismissed the application to set aside her own decision on 7 August 2014. The appeal notice of 25 February 2015 was therefore so patently out of time by more than six months after the decision of 7 August 2014 which ought to have been appealed instead of applied to be set aside. The present appeal was therefore defective.

I

Further, neither the breach of the 'unless order' not the erroneous mode of challenging the dismissal could be cured by O. 1A of the ROC. (para 48)

Case(s) referred to:

Chua Cheng Wan v. Chua Thiam Siew & Ors [2000] 1 CLJ 433 HC ***(refd)***
Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors [2010] 1 LNS 830 HC ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
George Westen Ltd v. Domtar Inc [2012] 354 DLR (4th) 121 ***(refd)***
Hatara (M) Sdn Bhd v. Petroliam Nasional Berhad [2010] 3 CLJ 550 CA ***(dist)***
Hong Leong Assurance Bhd v. American Home Assurance Co, Malaysia [2008] 1 LNS 141 HC ***(refd)***
Hytec Information Systems v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***
Kirba Daisy John Das v. Mahinder Singh Bachittar Singh [2011] 1 LNS 1854 CA ***(refd)***
Lay Beng Chai & Anor v. Ismail Hungsang Transport Sdn Bhd (Civil Suit No (MT-1) 22-713-2001) (Unreported) ***(refd)***
Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor [1999] 1 CLJ 526 HC ***(refd)***
Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(foll)***
Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***
Multiview Enterprise Sdn Bhd v. Orientus Industry Sdn Bhd [2005] 7 CLJ 17 HC ***(refd)***
Pereira v. Beanland [1996] 3 All ER 528 ***(refd)***
Re Jokai Tea Holdings Ltd [1992] 1 WLR 1196 ***(refd)***
Reiss v. Woolf [1952] 2 All ER 112 ***(refd)***
Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA ***(refd)***
Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd [2003] 5 CLJ 63 HC ***(refd)***
Syed Mohamed Abdul Muthaliff and Junaitha Begum w/o Abdul Halim v. Arjan Bisham Bhishham Chotrani [1999] 1 SLR 750 ***(refd)***
Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***
Tee Ha Leong v. Tetuan Low & Lim & Anor [2005] 2 CLJ 78 HC ***(refd)***
United Malayan Banking Corporation Berhad v. Palm and Vegetable Oils (M) Sdn Bhd & 3 Ors [1994] 3 CLJ 144 SC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A. O. 34 rr. 2(1), (2), (3), (4), O. 56 r. 1(3)
Rules of the High Court 1980, O. 20 r. 9, O. 34 r. 7, O. 92 r. 4

For the plaintiff - CW Chen; M/s Patrick Das & Co
For the 1st, 2nd & 3rd defendants - Desmond Louis; M/s D J Louis & Co
For the 4th defendant - Sasindran Kuttappan; M/s Nor Ding & Co

[Editor's note: On 25 August 2016, the Court of Appeal in Civil Appeal No: J-03(IM) (NCVC)-68-07-2015 allowed How Hock Sing's appeal and set aside the order of the High Court herein. The respondent's application for leave to appeal to the Federal Court vide Civil Application No: 08-(i)-475-09-2016 (J) was dismissed on 6 February 2017.]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Mohd Nazlan Mohd Ghazali JC:

Introduction

B **[1]** This is an appeal, documented in encl. 48 against the decision of the learned Deputy Registrar ("DR") on 17 February 2015 dismissing the application of the plaintiff dated 29 August 2014 (encl. 19) principally for the following orders:

(i) The setting aside of the decision of the learned DR on 7 August 2014 which had struck out the claim by the plaintiff; and

C

(ii) The reinstatement of the said claim.

[2] At the hearing on 21 June 2015, I dismissed the appeal (with costs) and provided broad reasons for the same. This is my full judgment for the decision, focusing on the law relating to the enforcement of "unless order"

D and the procedure for challenging the same.

Key Background Facts

[3] The plaintiff's action against all the four defendants was struck out on 7 August 2014 by the learned DR by reason of the failure by the plaintiff to

E comply with an "unless order" issued on 17 June 2014. It is necessary for me to provide a more detailed set of facts for a better appreciation of the context of the striking out.

[4] The instant case involves six pre-trial case management conferences. At the second session on 8 May 2014, by way of the issuance of an "unless

F order" pursuant to O. 34 of the Rules of Court 2012 ("RC 2012"), the learned DR directed parties to file bundle of pleadings, common bundle of documents, list of witnesses and case summary by 17 June 2014. At the subsequent pre-trial case management conference on 17 June 2014, the learned DR issued another "unless order" directing the plaintiff to ensure the

G filing of the common bundle of documents, statement of agreed facts and statement of issues to be tried, by 7 August 2014 since these were supposed to have been prepared and filed by the plaintiff by then (17 June 2014) but not done.

[5] At the same time, a mediation session amongst the parties had also

H been scheduled for 23 June 2014. The first mediation took place on the said 23 June 2014 and at the conclusion of the second session on 7 July 2014 parties agreed to further mediate and 20 July 2014 was fixed for the third mediation session.

[6] Following the conclusion of the second mediation, on the same day

I counsel for the plaintiff informed the court that the mediation would be further progressed on 20 July 2014, with the likelihood of parties applying

for a settlement or consent order. The counsel for the first, second and third defendant informed the court that the case had also been fixed for further case management on 7 August 2014 and for trial on 22 and 23 September 2014.

[7] At the third mediation session on 20 July 2014 parties failed to reach an agreement. The failure of the mediation was recorded by the court on the same day. Before the learned DR at a case management on the same day, the counsel for the plaintiff was informed by the learned DR that the outstanding documents from the plaintiff as specified in the "unless order" of 17 June 2014, requiring the plaintiff to ensure filing of the same by 7 August 2014, should be adhered to.

[8] At the same case management on 20 July 2014, counsel for the first, second and third defendant informed the counsel for the plaintiff to furnish the former the proposed statement of agreed facts and statement of issues to be tried prior to the Hari Raya Aidilfitri break to enable the counsel for the first, second and third defendant revert in time and in turn, allow the counsel for the plaintiff to file the outstanding documents by 7 August 2014.

[9] On 3 August 2014, the plaintiff changed solicitors acting for him in this matter. At the case management before the learned DR on 7 August 2014, since the plaintiff had still not filed the said outstanding documents, the learned DR having found the violation of the "unless order" for the second time by the plaintiff, decided to enforce the order and thus struck out the claim by the plaintiff against all four defendants with costs.

[10] At the same case management where the plaintiff was represented by a new counsel, the learned DR also directed that the presence of the previous counsel for the plaintiff purportedly in a capacity as *"amicus curiae"* (objected to by counsel for all defendants) was not permitted since he had ceased to act on behalf of the plaintiff.

[11] The application by the plaintiff (encl. 19) to set aside the striking out and reinstate the claim was on 29 August 2014 refused by the same learned DR, resulting in the present appeal.

The Submissions By The Plaintiff

[12] The plaintiff contended that despite the plaintiff having changed solicitors, the learned DR's decision to disallow the presence of the previous counsel of the plaintiff at the case management on 7 August 2014 deprived the plaintiff the ability to fully clarify the situation pertaining to the status of the filing of the outstanding documents.

[13] The plaintiff submitted that in any event the plaintiff had substantially complied with the directions of the court, apart from the filing of the common bundle of documents. Furthermore the parties were also working towards agreeing to recording a consent judgment in mediation sessions proceeding in parallel. The plaintiff contended that parties had agreed that

A the outstanding documents would be filed only if mediation failed. The mediation did eventually fail. Further, at the same time, counsel for the plaintiff was also waiting to be furnished with documents from the office of the Deputy Public Prosecutor on a criminal charge against the first defendant.

B **[14]** The plaintiff also submitted that it had followed the correct procedure to challenge the decision of the learned DR in dismissing the setting aside application. The Court of Appeal decision in *Hatara (M) Sdn Bhd v. Petroliam Nasional Berhad* [2010] 3 CLJ 550; [2010] 1 MLRA 68 was referred to in support of this submission, given what the plaintiff argued to be the ruling C of the Court of Appeal that when a case is struck out, as opposed to being dismissed, it would not be necessary to appeal and an application for reinstatement could be resorted to instead. Further, the plaintiff asserted that referring to the principle expressed in *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491; [1995] 1 MLJ D 292, "a rule of court should not be construed so as to produce unfairness or a manifest injustice."

The Submissions By The Defendants

[15] The counsel for the first, second and third defendant and the counsel for the fourth defendant on the other hand contended that the decision of the E learned DR enforcing the "unless order" by striking out or dismissing the action by the plaintiff is fully justified given the non-compliance and her subsequent decision refusing to set aside and reinstate is also well within the law and supported by case law authorities. A party aggrieved by the striking out or dismissal of the action by reason of the enforcement of the "unless F order" should properly appeal against the decision under O. 56 RC 2012 and not appeal to the learned DR for reinstatement, who then also became "*functus officio*", having already made the decision to strike out. In addition, this appeal is also out of time, since the decision dismissing or striking out the application to reinstate was made on 17 February 2015. It would have G been even much more delayed if the appeal were to be against the first decision to enforce the "unless order" in dismissing the plaintiff's action, taken on 7 August 2014.

The Applicable Law & Findings By This Court

H *Order 34 & "Unless Order"*

[16] The rules on pre-trial case management are contained in O. 34 of RC 2012. They came into effect on 1 August 2012 and superseded the previous O. 34 of the Rules of High Court 1980 ("RHC 1980") which applied to actions begun by writ. The amendments brought into effect significant I changes to the procedures to be adhered to prior to the trial of an action. The term "case management" is described by Brown J in *George Westen Ltd v. Domtar Inc* [2012] 354 DLR (4th) 121 as follows:

> refers to a broad range of powers exercised by judges in the course of managing a civil proceeding. Through case management, a judge intervenes in the proceedings prior to trial in order to give directions for the preparation of the case for trial, for the actual conduct of the trial, or to attempt to resolve the proceedings. Case management requires the application of a range of management tools in order to secure the just, most expeditious, least expensive and proportionate determination of proceedings on its merits.

[17] However, the pro-active role expected of the courts in stipulating time-frames and giving directions for the purpose of the trial, supported by the authority to impose sanctions for failure to comply with such directions is not newly introduced by O. 34 of the RC 2012. It was already embodied in O. 34 of RHC 1980. In the decision of the Federal Court in *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301*;* [2004] 3 MLJ 465, Mohd Noor Ahmad FCJ stated the following:

> The learned trial judge should have also considered the need to expedite the disposal of the case with a view of saving costs, reducing delays and minimizing the burden of the court. Our civil procedure had been revamped from time to time for the purpose. One example is the case management procedure (Order 34 of the Rules of the High Court 1980 ("the RHC")). The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

[18] Nevertheless, the language in the present O. 34 unmistakably provides for a greater emphasis in the directory and pro-active nature of the judicial role and extent of involvement now envisaged in pre-trial case management. The relevant parts of O. 34 r. 2(1) and (2) of RC 2012 read as follows:

> Pre-trial case management when directed by the Court (Order 34 r 2)
>
> 2(1) without prejudice to rule 1, at any time before any action or proceedings are tried, the Court may direct parties to attend a pre-trial case management relating to the matters arising in the action or proceedings.
>
> (2) at a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including ...

[19] It surely therefore stands to reason that a necessary pre-requisite for a workable and efficient environment where the courts are under the duty "to secure the just, expeditious and economical disposal" of actions is that there ought to be a robust case management system which does not easily tolerate lax enforcement of case management orders. This is acknowledged by the new provision in O. 34 r. 2(3) which is more specific in stating the consequence of not complying with such orders if compared against the previous O. 34 r. 7 of RHC 1980. The latter reads as follows:

> 7. Failure to comply with Judge's direction
>
> If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the Judge as meets the ends of justice.

[20] The case of *Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd* [2003] 5 CLJ 63; [2002] 7 MLJ 538 held that authority to make such orders must include the power to order that the defence and counterclaim be dismissed and judgment be entered for the plaintiff. The present O. 34 r. 2(3) and (4) of RC 2012 on the other hand more categorically provides the following:

> (3) The Court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, **if any party defaults in complying with any such directions, dismiss such action** or proceedings or strike out the defence or counterclaim or enter judgment or to make such order as it thinks fit.
>
> (4) Any judgment or order made under rule 2 (3) may be set aside by the Court, on the application of the party, on such terms, if any, as it thinks just.
>
> (emphasis added)

[21] An "unless order" is an order of the court that directs a party to perform some process requirement by a specified date and states the consequences of transgression. In the case of *Hong Leong Assurance Bhd v. American Home Assurance Co, Malaysia* [2008] 1 LNS 141; [2008] 8 MLJ 547, the plaintiff's explanation for the failure to comply with the direction to file and serve its witness statements was rejected by the High Court. In dismissing the suit under O. 34 r. 7 of RHC 1980, Hishamudin J (as he then was) stated the following:

> The action ought to be dismissed as there was a clear non-compliance with the High Court's previous case management direction. The non-compliance was of such a nature as to give the impression that the plaintiff had scant respect for the High Court's case management directions and was not serious in prosecuting its claim against the defendant. The plaintiff clearly had more than ample time to prepare the witness statements.

[22] In a case involving a non-compliance of an "unless order" issued during trial proceedings requiring the filing and service of a handwriting expert report, the High Court in *Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors* [2010] 1 LNS 830; [2011] 1 MLJ 646 held, following the English Court of Appeal decision in *Reiss v. Woolf* [1952] 2 All ER 112, that an "unless order", being a peremptory order of the court, must be adhered to and its non-compliance should automatically attract the penalty prescribed in the order. The court must first ensure that the terms of the order were clearly stated and that there was a complete failure of complying with the same. In the decision of the Federal Court in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 AMR 1 which concerned RHC 1980, Zulkefli CJ (Malaya) made the following key observation in respect of the new O. 34 of the RC 2012:

> It is our judgment that under the new Order 34 and particularly under r. 1(3), it would require the High Court to take into account all the breaches and non-compliance by the plaintiff at the time of evaluation of its failure to progress the case before deciding whether to dismiss the action.

In the instant case, the "unless order" contains the following paragraph, which prescriptive language on consequences for disobedience leaves little room for any dispute in its interpretation:

> For the removal of doubts, it is hereby declared that the above directions, including all other directions given earlier, if any, are to be treated as peremptory orders and non compliance with any of the orders may result in the action or proceedings being dismissed or judgment entered or struck out as the case may be and that in any event an adverse order may be made against the defaulting party (O. 34 r. 2(3)).

Evaluation Of Circumstances Justifying Enforcement Of The "Unless Order"

[23] Did the learned DR in the instant case exercise her discretion correctly in deciding to enforce the "unless order" by dismissing the action by the plaintiff? This is where the facts and circumstances of the breach and the explanation proffered by the plaintiff must be closely examined. The plaintiff did not deny he failed to comply with the direction to file the common bundle of documents by the stipulated date of 7 August 2014. The argument pertaining to the change of solicitors in my view however is not convincing. First, the plaintiff chose to change solicitors on 3 August 2014 which was so perilously close to the deadline of 7 August 2014 for filing as stipulated by the "unless order". Secondly, although well within his right to his own choice of counsel, the timing of the plaintiff effected the change was not prudent. It could give rise to the suspicion, as it did to the defendants, that the plaintiff was merely using the change as a delaying tactic, in part as an excuse for the anticipated delay in complying with the "unless order".

A Thirdly, the previous counsel for the plaintiff certainly did not have *locus* to appear in the case management proceedings on 7 August 2014 and the decision of the learned DR accepting the objection by counsels for all defendants on this issue is thus not flawed. The previous counsel's purported capacity as *"amicus curiae"* is completely misconceived since the expression B is latin for literally, "friend of the court", in respect of one who is not a party to the action. In the instant case, the previous counsel sought to assist the new counsel for the plaintiff. There is also no tenable basis for the allegation that the counsels for the defendants sought to collectively apply pressure by stating their objection to the presence of the previous counsel for the plaintiff, C and in the process conceal the chronology of true facts. Fourthly, it is elementary that the new counsel must surely be bound by any pre-existing directions of the court. Proper legal professional ethics would expect if not demand the new counsel, when considering to agree to accept the appointment, to have first assessed all aspects of the suit. It would suggest a certain disregard on the part of the plaintiff for the authority of the court D and the "unless order" since only during the case management conference on 7 August 2014 itself that an application was made to extend time for compliance with the "unless order". Fifthly, even the said application was however only made verbally during the proceedings. The plaintiff did not even make the effort to draft a properly written, if only a simple application, E to at least demonstrate the seriousness and sincerity of his request for the extension of time. On a related point, even if it was argued that the predicament of the plaintiff arises from a mistake of his counsel, this is still not a sufficient excuse (see *Chua Cheng Wan v. Chua Thiam Siew & Ors* [2000] 1 CLJ 433). It is instructive to observe that in the English Court of Appeal F decision in *Hytec Information Systems v. Coventry City Council* [1997] 1 WLR 1666, Ward LJ said that it would become a charter for the incompetent if the court had to conduct almost impossible investigations in apportioning blame between the solicitor on one hand and his client on another.

[24] The fact that a mediation was also being pursued by parties during the G subsistence of the "unless order" was contended by the plaintiff as being another reason for the delay in not complying with the "unless order". I do not find evidence to support this line of argument. There was no agreement amongst parties that they would only re-visit the issue of the outstanding documents only if mediation failed. It is common practice and understanding H for parties to pursue both mediation and trial preparations concurrently since "unless order" generally, as well as in the instant case specifically, are not held in abeyance when mediation is being pursued. In the affidavit of the previous counsel (encl. 21), it was stated that in his letter of 14 June 2014, the counsel for the first, second and third defendant clearly identified an I agreement of parties at that time to extend time. However after having reviewed the letter I concluded that it cannot be construed in the manner

suggested by the plaintiff's previous counsel. The closest to such an alleged agreement between parties is the reference in a paragraph in the said letter to the following:

> As discussed and agreed, the parties will seek a further case management date to finalize the Common Bundle of Documents by agreement as far as possible.

I fail to decipher where in the letter and specifically in that statement, does an agreement amongst the parties can be evinced. In my view this statement is more about parties intending to seek a further case management date at the session to be held on 17 June 2014 (which is usually the case in any event, as the court oversees parties' preparation towards trial, in this case fixed for 22 and 23 September 2014) and less or nothing about them agreeing on an extension of time. This letter was a mere three days before the case management on 17 June 2014. Whatever understanding there could have been amongst the parties, it would have been superseded by directions issued by the court on that 17 June 2014 case management conference. As it turned out, since the common bundle of documents had not been filed by the plaintiff by the case management of 17 June 2014 notwithstanding the "unless order", another "unless order" was made on 17 June 2014, requiring compliance by the plaintiff by 7 August 2014, being a further case management date. In any event, even if there were an agreement to extend amongst parties (which is not the case) it is for the court to decide on the matter. The fact is the deadline was not subsequently extended by the court.

[25] The responsibility to prepare and file the common bundle of documents was the plaintiff's. Although preparation would obviously require involvement of the defendants, the letter dated 14 June 2014 from the counsel for the first, second and third defendant included an enclosure with the proposed copy of the third volume (pp. 697 to 811), the first two volumes having been furnished to the plaintiff, according to the letter, on 12 June 2014. The letter also contained suggestion on the placement of documents in the relevant bundles. However there was no response to this letter and no feedback from the counsel for the plaintiff on the status of the proposed common bundle of documents. Yet this was as early as 14 June 2014. As it turned out, the common bundle of documents were still not filed by 17 June 2014 or even by 7 August 2014. Even if the contention that the mediation process suspended the preparations for trial, which is not true, there was still a good more than two weeks for the plaintiff to make the effort to comply before the deadline of 7 August 2014 set by the second "unless order" dated 17 June 2014.

[26] Neither can the contention that the plaintiff was also awaiting relevant documents on criminal proceedings against the first defendant be sustained and justify the non-compliance by the plaintiff. The matter was never raised

A to the counsels for the four defendants nor in any of the prior case management proceedings. I agree with the submission of the counsel for the fourth defendant that this appears to be more of an afterthought.

[27] In my view, when evaluating the circumstances and reasons for a breach of an "unless order" with a view to determining the correctness of the B decision to dismiss an action, a number of key considerations must be taken into account, in line with the principles enunciated by caselaw authorities. This is what I shall do next.

(i) Whether the failure to comply was intentional and contumelious C (see *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; [2004] 4 MLJ 446)

The ability to comply with the direction to file the common bundle of documents is entirely within the control of the plaintiff. The counsel for the first, second and third defendant's proposal on the same as expressed D in their letter of 14 June 2014 itself was not responded to by the plaintiff. It cannot be legitimately said that the failure to comply was due to extraneous circumstances. The mediation process, the Hari Raya Aidilfitri break and the change of plaintiff's own solicitors were either within the control or the knowledge of the plaintiff that negate any arguments of supervening events resulting in the non-observance of the E "unless order". Even as late as the date of the final mediation of 20 July 2014, the plaintiff had some 18 days to comply. This the plaintiff failed to do. Instead, on 7 August 2014 itself on the expiry of the direction contained in the unless order, the plaintiff chose to spring a surprise at the case management conference by getting his freshly appointed new F counsel orally applying for an extension of time. The non-compliance is therefore inexcusable and the failure is intentional and contumelious.

(ii) Whether there is a history of failure to comply with other orders (see *Hytec Information Systems*, *Md Amin Md Yusof*)

G The failure to comply with the "unless order" dated 17 June 2014 to file the common bundle of documents which led to the dismissal of the action is not the first non-compliance by the plaintiff. The plaintiff had earlier failed to file the said common bundle of documents pursuant to an earlier "unless order" dated 8 May 2014. Thus, there was a repeated H failure by the plaintiff to comply with two separate "unless orders" in respect of the direction to undertake the same responsibility of filing the common bundle of documents.

(iii) Whether the defendants contributed to the failure by the plaintiff (see *United Malayan Banking Corporation Berhad v. Palm and Vegetable Oils* I *(M) Sdn Bhd & 3 Ors* [1994] 3 CLJ 144; [1994] 3 MLJ 73)

I do not find evidence of the defendants contributing to the delay. If anything, the counsel for the first, second and third defendant's letter to the plaintiff's counsel on 14 June 2014 concerning the preparation of the common bundle of documents itself was not dealt with the plaintiff. In his affidavit affirmed on 8 November 2014, the counsel for the first, second and third defendant stated that during case management on 20 July 2014 immediately following the failure of mediation on the same day, he had asked the counsel for the plaintiff to respond to the letter of 14 June 2014 for the plaintiff's concurrence on the common bundle of documents before the Hari Raya Aidilfitri break. But this was not attended to by the plaintiff. Further, as discussed earlier, there was no agreement amongst parties to extend time but only to seek a further case management date. There is accordingly no basis to hold any of the defendants to be even slightly responsible for the failure by the plaintiff.

(iv) Whether the plaintiff had made positive efforts to comply but was prevented from doing so by extraneous circumstances *(Hytec Information Systems)*

As analysed under item (i) above, there were clearly no extraneous circumstances that prevented the plaintiff to strictly adhere to his responsibility to perform the task of filing the common bundle of documents as early as prior to the first "unless order" of 8 May 2014. At the same time there was no evidence of positive efforts made by the plaintiff working towards ensuring compliance with the "unless order". Instead, the plaintiff's non-response to the counsel for the first, second and third defendant's letter of 14 June 2014 strongly suggested otherwise. The plaintiff's request for extension only on the day the "unless order" expired was in this context, most telling and reflected clearly the absence of any positive effort or his part to comply.

[28] The above considerations are to be taken into account in determining whether the consequence of dismissal of the action under O. 34 r. 2(3) is justified. Ultimately each case must be decided on its own facts. There are also authorities which suggest that other considerations that should be taken into account include whether there is prejudice to the non-defaulting party (see the Singapore Court of Appeal case of *Syed Mohamed Abdul Muthaliff and Junaitha Begum w/o Abdul Halim v. Arjan Bisham Bhishham Chotrani* [1999] 1 SLR 750) and whether the dismissal is proportionate to the failure to comply (see *Re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196). In my view, it is imperative that the courts, in performing its judicial function overseeing pre-trial case management not lose sight of the rationale for the enactment of the new O. 34, and should therefore be mindful not to be too accommodative in searching for excuses for the failure of parties to comply

with "unless orders" precisely because of the fundamental tenet that obedience to such orders is the very foundation and core premise on which such orders are made in the first place.

[29] In any event, even if these are relevant considerations (and notwithstanding the case of *Pereiva v. Beanlands* [1996] 3 All ER 528 which suggests otherwise in that prejudice was not relevant when considering failure to comply with "unless order"), I would also find that there was prejudice to the defendants as the failure to comply by the plaintiff affected adversely the preparation by the first and third defendants of their counter-claim against the plaintiff, which has now been postponed. In *Hytec Information Systems,* Ward LJ said that the interests of justice requires that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. Additionally, I also find that the consequence of dismissal commensurate with and is proportionate to the failure in question, considering the circumstances of the case.

[30] Accordingly, in view of the foregoing evaluation, after taking into account the facts and circumstances of the case and applying the principles established by case law authorities, including on the *raison d'etre* of an "unless order" under O. 34 r. 2 (3) of RC 2012, I held that the decision of the learned DR dismissing the action of the plaintiff for the latter's failure to comply with the "unless order" is a correct and proper exercise of her judicial discretion, is not flawed and ought therefore not to be disturbed.

The Proper Mode Of Challenging Dismissal Due To Non-compliance With "Unless Order"

[31] I shall in the rest of this judgment consider the issue as to the proper mode of challenging the decision of the learned DR in dismissing the action under O. 34 r. 2(3) of RC 2012. Simply stated, the question is whether the plaintiff was correct in having made an application to set aside (encl. 19) the decision of the learned DR and reinstate the action or that he should have instead appealed to the judge in chambers under O. 56. The relevant parts of O. 56 r. 1 state as follows:

> Appeal from certain decisions of Registrar of the High Court to a Judge in Chambers (Order 56 r 1)
>
> 1(1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, the notice shall be filed within fourteen days after the judgment or decision appealed against was given or made ...

[32] The decision of the Federal Court in the case of *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233; [2001] 3 AMR 2981 ("*Lim Oh*") is the leading authority for the proposition that for a case that has been struck out due to failure to comply with a peremptory order, the remedy for the aggrieved party is to appeal against the decision to strike out. This passage from the judgment of Steve Shim CJ (Sabah & Sarawak) is most instructive:

> Given the view which we take that there was clearly in existence a peremptory order of the court and that the learned Senior Assistant Registrar had struck out the appellants' first suit for disobedience of the peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

[33] The failure in that case was in relation to the non-filing of an amended writ and statement of claim under O. 20 r. 9 of RHC 1980. Instead of appealing, the appellants filed another suit. In the instant case, the breach of the "unless order" is in respect of O. 34 r. 2(3) of RC 2012 and the plaintiff did not file a new suit (nor appealed against the dismissal) but instead sought to set aside the same. However, in my view, of greater significance is the overriding principle enunciated by *Lim Oh* that filing an appeal is the proper mode of challenging a dismissal or striking out of action due to a breach of a peremptory or "unless order". It is immaterial that the instant case involves a different factual situation in that the direction being breached is an "unless order" under the current O. 34 of RC 2012 or that the plaintiff sought to reinstate instead of filing a second suit.

[34] In the case of *Multiview Enterprise Sdn Bhd v. Orientus Industry Sdn Bhd* [2005] 7 CLJ 17; [2005] 7 MLJ 282, the breach was like in the instant case in relation to an "unless order" (*albeit* under O. 34 of the RHC 1980) on the failure to comply with direction given at pre-trial case management conference, and the aggrieved plaintiff like the plaintiff in the instant case filed to reinstate the writ and statement of claim which had earlier been struck out. Azahar Mohamed JC (as he then was) ruled, following *Lim Oh*, that the "unless order" was in the nature of a peremptory order of the court and the proper course of action that ought to have been taken by the plaintiff aggrieved by the decision of a judicial commissioner of the High Court in striking out the action due to the breach of the said order was by way of an appeal to the Court of Appeal and not by filing a summons in chambers to reinstate the writ and statement of claim.

[35] I do not consider that the approach or interpretation of the principle in *Lim Oh* should be different in any substantive or meaningful manner merely because *Lim Oh* and *Multiview* were pronouncements on cases prior to the new RC 2012. In an unreported case of *Lay Beng Chai & Anor v. Ismail Hungsang Transport Sdn Bhd* (High Court of Malaya at Johor Bahru Civil Suit No (MT-1) 22-713-2001, with facts similar to the instant case, and involving a breach of "unless order" under O. 34 of the present RC 2012, Abdul Rahman Sebli J (as he then was) held as follows:

> Similarly in the present case the 1st plaintiff's failure to appeal against the order of the learned Deputy Registrar means that he accepted the correctness of her decision to strike out the notice of assessment for damages. By applying to the Judge in Chambers for reinstatement, the 1st plaintiff, like the appellants in *Lim Oh & 6 Ors (supra)* is attempting to circumvent the necessary appeal procedure and this constitutes an abuse of the court process. On this ground alone the 1st plaintiff's application in enclosure 99 ought to be struck out.

[36] The principle in *Lim Oh* should therefore rightfully represent the law governing the proper mode of challenging any decision to dismiss or strike out actions by reasons of any violation of "unless order" under O. 34 r. 2(3) of RC 2012. A party whose action is dismissed on account of non-adherence to an "unless order" must therefore appeal against the said decision instead of seeking to reinstate the case.

[37] As mentioned earlier, the plaintiff submitted on a decision of the Court of Appeal in *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550; [2010] 1 MLRA 68 ("*Hatara*"). In this case, the plaintiff similarly did not appeal against a striking out order which had been made following the plaintiff's failure to comply with an "unless order" within the context of a case management. Although the Court of Appeal made mention of the decision of the Federal Court in *Lim Oh*, it did not discuss the principles in *Lim Oh* but instead ruled that despite its failure to appeal, the plaintiff had the locus to apply to reinstate its action under the inherent jurisdiction of the court pursuant to O. 92 r. 4 of the RHC 1980. In arriving at its decision, the Court of Appeal drew a distinction between a striking out and a dismissal of a case and referred to the High Court's decision in *Tee Ha Leong v. Tetuan Low & Lim & Anor* [2005] 2 CLJ 78; [2005] 4 MLJ 426, where James Foong J (as he then was) stated as follows:

> Having considered the above authorities, which are all made - by courts of concurrent jurisdiction, I am of the view that there is a distinction between striking out and dismissing a case. If the case is struck out then Order 35 r. 2(1) of the RHC can be utilised to apply for reinstatement. But when the case in dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

[38] The Court of Appeal in *Hatara* therefore held in addition to that the striking out had occasioned a substantial miscarriage of justice that as the judge did not hear the case on merits when making the striking out order of the suit by the plaintiff, it was proper for the plaintiff to have applied for reinstatement as the court may exercise its powers under O. 92 r. 4 where the rules do not lay down a particular form of procedure to meet the exigencies of the case.

[39] In my view, even though the facts in *Hatara* pertaining to an application to reinstate are similar to those in the instant case, the principle in *Lim O*h requiring the mode of appeal to be resorted to in cases involving breaches of peremptory or "unless order" should be considered to be settled law.

[40] Quite apart from *Lim Oh* being a decision of the Federal Court, the ruling in *Hatara* which allowed the reinstatement of a case struck out for breaching an "unless order" because the suit has not been heard may suggest a fundamental review, if not an effective reversal of the principle in *Lim Oh*. This is in light of the fact that cases involving enforcement of "unless order" made during pre-trial case management would almost by definition not be heard on merits. Authorities which follow the principle in *Lim Oh* all did not involve adjudication on merits (in terms of the substance of the case). In my judgment, *Hatara* may be distinguished on its facts, as the Court of Appeal found that the striking out was in any event not justified and that His Lordships' evaluation of the case was deprived of the benefit of reviewing the written judgment of the High Court Judge. The Court of Appeal said:

> The drawback in hearing this appeal was that there was no written judgment given by the learned judge. We do not know whether the plaintiff's application for reinstatement was dismissed because the learned judge found the court had no jurisdiction or because the Court was of the view that the discretion ought not to be exercised in the plaintiff's favour.

[41] In addition, the basis of the decision in *Hatara* appears to be the distinction between dismissal and striking out. As stated above, *Tee Ha Leong* (which was referred to in *Hatara* to explain the distinction) suggested that when the case is dismissed, the avenue opened to the aggrieved party is to appeal. In my view, for present purposes, it may not be entirely beneficial to dive deep into the true distinction between "striking out" and "dismissal" because the core issue of whether or not the case has been heard on merits is of little relevance to the well-established principle in *Lim Oh* and other authorities that appeal is the correct mode of challenging a striking out or dismissal for disobedience of a peremptory or "unless order". In addition, in the instant case, the decision of the learned DR in removing the action by the plaintiff is strictly a "dismissal" in accordance with the wordings in the

present O. 34 r. 2(3), which provision confers upon the learned DR the authority to make such order in the first place. Given the introduction of the term "dismissal" in the present O. 34 r. 2(3), decisions to dismiss actions under the said O. 34 r. 2(3) following any failure to obey an "unless order" could, applying *Tee Ha Leong,* be construed to be capable of challenge only by way of an appeal, thus at the same time reinforcing the principle enunciated in *Lim Oh*.

[42] A related contention I should highlight, although not specifically submitted by the plaintiff is that the present O. 34 r. 2(4) (as set out earlier in this judgment), in providing for the right of the aggrieved party to challenge the decision to dismiss for breach of "unless order" actually uses the words "may be set aside". This could be argued to suggest that RC 2012 now mandates that the correct procedure to be pursued in order to challenge a decision enforcing an "unless order" to be by an application to set aside as distinct from and instead of by way of an appeal.

[43] In my view, it is not the intent and purport of O. 34 r. 2(4) by introducing the words may be "set aside" that an "application to set aside" must be made or is the proper and correct mode of challenging the decision instead of the plaintiff proceeding by way of an appeal. An interpretation contrary to *Lim Oh* would require much clearer and more specific words to displace the provisions of O. 56 concerning appeal against decisions of registrars to the judge in chambers. In the first place, there is no question that in the instant case the decision by the learned DR dismissing the action is appealable to the judge in chambers under O. 56 of RC 2012. Secondly, in my view the use of the word "set aside" in O. 34 r. 2(4) is intended to be in the context of the general understanding of the consequence of a successful challenge to the decision to dismiss the action which is to have the decision set aside. However in order to achieve the successful reversal of the said decision, it does not mean that an application to set aside must be filed pursuant to O. 34 r. 2(4). Order 34 r. 2(4) states the relevant decision may be set aside by the court, on the "application" of the party. In my view this "application" must, considering the Federal Court's decision in *Lim Oh* and the absence of any basis to support the contention that O. 34 r. 2(4) of RC 2012 envisages a clear departure from *Lim Oh* or contemplates an exception to O. 56, therefore mean an application to appeal under O. 56 of RC 2012 to the judge in chambers or to appeal to a higher Court.

[44] Thirdly, I am fortified in taking this view in light of the case of *Chua Cheng Wan v. Chua Thiam Siew & Ors* [2000] 1 CLJ 433, which also involves an application to reinstate following the dismissal of the action for want of prosecution. Abdul Wahab Patail J (as he then was) stated this:

> The proper course of action to be taken by any party aggrieved by an order is by way of an appeal. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. Striking out an action disposes off the case finally so far as the court hearing the matter is concerned. That order takes effect immediately and remains in effect unless it is set aside.

[45] There therefore appears to be a divergence in the position as to whether a striking out disposes off a case finally in light of what seems to be an opposite position taken in *Tee Ha Leong*. But *Lim Oh*, as followed by cases such as *Multiview* is manifestly clear in its overriding proposition that a challenge to a dismissal or striking out due to a breach of a peremptory or "unless order" must be by way of an appeal. As such, whether the case in question has been heard on merits or not is not determinative of the mode of challenge. Of further relevance to the instant case is the following passage from the same judgment in *Chua Cheng Wan*:

> **An order may be set aside ordinarily by way of an appeal**. Thus where the order was made by a senior assistant registrar, the appeal is made to a judge in chambers pursuant to Order 56 r 1 of the Rules of the High Court 1980. Appeals pursuant to Order 56 r 2, like other appeals would be to the Court of Appeal. It is essential in my opinion to the due administration of our system of law that the appeal is dealt with by a higher authority. Once a matter has been concluded, it is no longer before that forum. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend to the making of orders in litigation that has been brought regularly to an end, **be it by a hearing on the merits or having been struck off**. Otherwise there can be no end to litigation. (emphasis added)

[46] This, is my view, further supports the construction of O. 34 r. 2(4) to mean that the proper mode of challenging the enforcement of an "unless order" is by pursuing an application to appeal to have the decision dismissing the action set aside. Accordingly, it is my judgment that a party aggrieved by a decision by a Registrar dismissing an action for non-observance of an "unless order" made under O. 34 r. 2(3) may seek to challenge the said dismissal only by way of pursuing an appeal to a judge in chambers in accordance with O. 56 of RC 2012.

[47] In the instant case that was exactly what the plaintiff should have done following the dismissal of his action on 7 August 2014. However, the plaintiff chose to apply to set aside the dismissal and reinstate the action to the same learned DR. Given that the correct procedure should have been for the plaintiff to have appealed directly to the judge in chambers who would have the jurisdiction to consider the appeal, his application before the learned DR was correctly dismissed by reasons of the setting aside being the wrong

mode of challenging the decision, the learned DR not having the jurisdiction to hear the appeal as well as being "*functus officio*". On the latter point of "*functus officio*", reference may be had to the decision of the Court of Appeal in *Kirba Daisy John Das v. Mahinder Singh Bachittar Singh* [2011] 1 LNS 1854; [2012] 5 MLJ 712, where having ruled that a judgment entered in the absence of the defendant was a regular and final judgment, the court also stated that the High Court judge who gave judgment could not entertain an application to set aside the same. The Court of Appeal held that the High Court judge was already "*functus officio*" and the only remedy is by way of an appeal against the findings in the judgment to an appellate court. The same principle could similarly apply to the instant case as the decision of the learned DR is regular and within the meaning of the words "any judgment, ... or decision" that is appealable to the Judge in Chambers under O. 56 r. 1 of RC 2012. There are therefore merits in the contention that the learned DR in the instant case was "*functus officio*" after having made the decision to dismiss the plaintiff's action.

[48] In addition, the plaintiff had also fallen into another error since the appeal to the judge in chambers was filed out of time. Order 56 r. 1(3) stipulates that the notice must be filed within 14 days after the decision is made. Rightfully it should be the decision of the learned DR made on 7 August 2014 that ought to have been appealed against. In the instant case, the appeal notice was filed only on 25 February 2015 and even then, that was in respect of the appeal against the subsequent decision of the learned DR who on 17 February 2015 dismissed the application to set aside her own decision of 7 August 2014. The appeal notice of 25 February 2015 is therefore so patently out of time by more than six months after the decision of 7 August 2014 which ought to have been appealed instead of applied to be set aside. In addition, neither was there any application by the plaintiff for an extension of time to file an appeal under O. 3 r. 5 of the RC 2012.

[49] In the case of *Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor* [1999] 1 CLJ 526, following a summary judgment entered against them, the defendants filed an appeal to the judge in chambers under O. 56 of the RHC 1980 and at the same time applied for stay of execution pending appeal. The application for stay was dismissed by the Senior Assistant Registrar. The defendants then filed another application for stay of execution, only this time to the judge in chambers. Abdul Aziz Mohamad J (as he then was) held as follows:

> ... The position is different when it comes to the question of going from a High Court registrar to a High Court Judge. There are no two courts involved. The decision of the registrar is already the decision of the High Court. When the registrar refuses a stay, it is a refusal of the High Court. A defendant cannot apply a second time to the High Court for a stay. As far as it is a matter of application, it was closed when the registrar refused

the application. He had already decided at the High Court. The only recourse open to the defendants was to seek to have the High Court decision changed and that had to be by way of an appeal from the registrar to the judge in chambers under Order 56, which the defendants were already too late to institute.

[50] Thus, similarly in the instant case, having dismissed the action of the plaintiff, the decision of the learned DR was a decision of the High Court. The learned DR had already decided as the High Court. She was also *functus officio*. The proper recourse ought to have been to appeal against the 7 August 2014 decision to the judge in chambers under O. 56 r. 1 but like in *Lee Shu Tuck*, the plaintiff in the instant case was already very late in the day to institute the appeal. Nor did the plaintiff consider applying for an extension.

[51] I should deal with one other point raised by the plaintiff which is that the Rules of Court should not be construed so as to produce unfairness or manifest injustice. As I have dealt with in the earlier part of this judgment, the dismissal of the action of the plaintiff by the learned DR is a proper exercise of judicial discretion and is not erroneous. It does not in my view represent an excessive emphasis on procedural compliance at the expense of substantive justice. There was no manifest injustice to the plaintiff. All circumstances of the breach had been considered and closely examined to ensure that the key rationale for the making of the peremptory "unless order", which is to secure a fair trial whilst according a timely and efficient delivery of the justice system, is substantially achieved. At the hearing, counsel for the plaintiff submitted that O. 1A of RC 2012 ought to be invoked in favour the plaintiff. Order 1A refers to the need for the court to have regard to the overriding interest of justice in administering the RC 2012, and not only to the technical non-compliance with the rules.

[52] I do not however consider this attempt at relying on O. 1A persuasive since in my view it is somewhat misconceived. First, the overriding interest of justice in the instant case favours the dismissal of the action following an evaluation of the circumstances related to the non-compliance. Secondly, the non-compliance cannot remotely be characterised as being merely technical in nature. It is not even a breach of a written provision of any of the RC 2012. The breach is in a nature of a non-compliance with a peremptory or "unless order" of the court. In my view, given the very nature of an "unless order", which specifically pre-determines the consequences of non-compliances, it is only in the most exceptional of cases can O. 1A be successfully invoked to cure a non-compliance with an "unless order" where the dismissal of the action by reason of the disobedience is adjudged to be justified. In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 5 AMR 298, Zaki Tun Azmi CJ (Malaysia), delivering the judgment of the Federal Court had this to say on O. 1A of RHC 1980 (which is in *pari materia* with the present O. 1A of RC 2012):

A

> The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as Order 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the rules. Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the rules. Otherwise, parties would be encouraged to ignore the rules. Thus in this case, Order 1A of the RHC does not apply as the respondents had intentionally disregarded Order 6 r. 7(2A) of the RHC for their own reasons ...
>
> As I had mentioned in court, if Order 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party who is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the rules.

B

C

D

Conclusion

[53] In light of the foregoing reasons, I ruled that the appeal by the plaintiff (encl. 48) against the decision of the learned DR refusing to set aside the dismissal of the action by the plaintiff be dismissed. The dismissal is fully justified considering the facts and circumstances of the breach of the "unless order" issued under O. 34 r. 2 (3) of the RC 2012. Additionally, the mode initiated by the plaintiff challenging the dismissal by the learned DR by applying to set aside the same and reinstate the action is wrong in law as the proper procedure that ought to have been taken was to have the decision appealed to the Judge in Chambers under O. 56 r. 1 of the RC 2012. The present appeal itself is considerably out of time and is therefore defective. Neither the breach of the "unless order" nor the erroneous mode of challenging the dismissal can be cured by O. 1A of the RC 2012. The appeal is dismissed with costs of RM800 to each of the four defendants.

E

F

G

H

I